Supreme Court, U.S.
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No. 98-36

In The

Supreme Court of the United States

October Term, 1997

ROY K. PRESTON,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF OF RESPONDENT GEORGIA POWER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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A. REASONS FOR DENYING THE WRIT

The Petition for Certiorari does not even facially set forth a compelling reason for this Court to review the constitutionality of a statute of the State of Georgia. This case does not involve a decision by a Court of Appeals of the United States. It does not involve a decision on an important federal question in conflict with any decision of another state court of last resort or of a United States Court of Appeals. Nor does it involve an important question of federal law that should be settled by this Court or that conflicts with relevant decisions of this Court. (See U. S. Supreme Court Rule 10.)

All that the Petition claims is that the Georgia High Voltage Safety Act requiring advance notice of work to be done within ten feet of an overhead high voltage line (a line carrying voltage in excess of 750 volts) as a condition precedent to liability of the owner or operator of the line is unconstitutional because it takes away an inchoate interest or right of action and denies him due process since it does not require the utility to notify him of the voltage of the line.

The Act in question (amending the 1960 Georgia High Voltage Act (O.C.G.A. § 46-3-30, et seq.)) became effective July 1, 1992, almost one year before Petitioner was injured. The Act prohibits any work within ten feet of an overhead high voltage line which has not been effectively guarded against danger from accidental contact. Where work must be done within the prohibited distance, advance notice must be given so that the utility can make the line safe before any work proceeds. (O.C.G.A. § 46-3-33).

Where work is done in violation of the Act, the violator shall be strictly liable for any resulting injury or damage. (O.C.G.A. § 46-3-40(b).) Furthermore, if someone violates the Act by working within the prohibited distance without having given notice, the utility is immune from liability for any resulting injury or damage. (O.C.G.A. § 46-3-39(a).) Where notice is given and the utility fails to effect the safeguards specified in the Act within a reasonable time, it shall be liable for the reasonable costs incurred by any such delay. (O.C.G.A. § 46-3-40(c).)

Petitioner was injured while standing on top of a railroad car. A 20 foot long pole he was handling made contact with Respondent's power line which ran parallel to the tracks. At the point of contact, the line was 13 feet 6 inches from the top edge of the car. Finding that no notice of the work was given to Respondent, the Georgia Court of Appeals held that summary judgment was proper.[1]

The Georgia Legislature deemed it proper to attempt to reduce work-place injuries. The Act is a legitimate effort toward that end. Petitioner's effort to avoid the beneficent purposes of the Act should fail.

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[1] Although the 1992 Amendment to the Act changed a number of provisions to the original 1960 Act, the worker himself, along with his employer, has been a person responsible for the work, and hence one who was required to give notice, since 1974. (Georgia L. 1974, p. 153, § 1.)

B. A STATE LEGISLATURE MAY PROSPECTIVELY ALTER OR ABOLISH TORT LIABILITY

Petitioner first argues that but for the legislative change in the High Voltage Safety Act in 1992, he would have had a tort claim against Respondent for the injuries he received in 1993. He "asks whether due process should not extend to certain interests not yet acquired." (Pet., p. 11.) What he suggests is that neither a state nor Congress should ever be able prospectively to abolish a statutory or common law claim or establish immunities.

Should this argument prevail, a legislative body would never be able prospectively to alter a statute of limitations, create governmental or charitable immunity, pass a Good Samaritan rule, create a recreational use limitation of liability, or even place a cap on punitive damages. Such is not the law nor should it ever be.

Despite dicta which Petitioner says leaves this question open (Pet., p. 11), this Court has left no doubt that its decisions clearly establish that a person has no property, nor vested interest, in any rule of the common law, that the Constitution does not forbid the creation of new rights or the abolition of old ones, and that statutes limiting liability are relatively commonplace. *Duke Power Co. v. Carolina Environmental Study Group, et al.*, 438 U.S. 59, 88 (n.32), 57 L. Ed.2d 595, 98 S. Ct. 2620 (1978).

Even in *Board of Regents v. Roth*, 408 U. S. 564, 573, 33 L. Ed.2d 548, 92 S.Ct. 2701 (1972), cited by Petitioner (Pet., pp. 10-11), this Court held that "procedural protection of property is a safeguard of interests that a person has already acquired in specific benefits." And in *Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 432, 71 L. Ed.2d 265, 102 S.Ct. 1148 (1982), also cited by Petitioner (Pet., p. 12), this Court recognized that "the State remains free to create substantive defenses for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs."[2]

The purpose of the High Voltage Safety Act is in part to prevent injury to persons from inadvertent contact with high voltage lines by providing that no work shall be done in the vicinity of such lines until the owner has been notified and has taken specified safety measures. (O.C.G.A. § 46-3-31). Recognizing that a utility cannot constantly patrol its thousands of miles of lines to see if someone is temporarily working near them, the legislature determined to place the duty on those doing the work to let the utility know when and where work activities would be necessary near lines so it could make them safe.[3] Absent such notice, the legislature deemed it fair and appropriate to grant immunity to the utility.

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[2] See also *New York Central Railroad v. White*, 243 US. 188, 198, 61 L. Ed. 667, 37 S.Ct. 247 (1917) ("no person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit"); *Ducharme v. Merrill-National Laboratory*, 574 F.2d 1307, 1309 (5th Cir., 1978) ("a plaintiff has no vested right in any tort claim for damages under state law.")

[3] See, e.g., *Tuscon Electric v. Swengel-Robbins Construction Co.*, 737 P.2d 1385 (Ariz., 1987) (statute represents a determination by the legislature that where work is being performed near power lines, the person or entity performing the work is in the best position to prevent injury by giving notice to the utility so that appropriate protective measures may be taken); *Kimery v. Public Service Co. of Oklahoma*, 622 P.2d 1066

The wisdom of the legislature, of course, is not a concern of the courts. See *State Ports Authority v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947). Moreover, it is axiomatic that every presumption will be made in favor of a statute's constitutionality and it will be voided only when the conflict between it and the fundamental law is clear and palpable. *Davis v. Board of Education of Coffee County*, 203 Ga. 44, 45 S.E.2d 429 (1947). Such is not the case here. The Georgia Legislature was authorized to change the Act prior to the time Petitioner was injured.

C. PETITIONER'S DUE PROCESS CLAIM WAS IRRELEVANT TO THE COURT OF APPEALS' DECISION

Petitioner claims that he was deprived of the opportunity to pursue any tort remedy "because *he* was not informed that the wire around which he worked was a high tension wire." (Pet., p. 9) (Emp. added.) The issue, he says, is "whether due process may require notice of imperceptible facts whose existence demands action in order to protect a potential future claim." (Pet., p. 10).

While recognizing "that the prior decisions of this Court do not go far enough to require notice in this situation" (Pet., p. 10), he cites only dicta from *Logan v. Zimmerman Brush Co.*, supra, for the possibility that due process notice may apply well before a hearing is in the

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(Okla., 1980) (it is far more effective and in the public interest to impose the burden of safety on those working near lines than to require a utility to maintain constant surveillance over all of its lines.)

picture. (Pet., p. 13). He has not cited a single case which supports his claim that due process required the utility to notify him that these lines were, indeed, high voltage.

His argument that the legislature could have required the utility to post signs on all poles that certain of the lines attached to them were high voltage does not mean that such signs would have prevented this accident. Petitioner was working high in the air and about midway between poles. Where should a warning sign have been located? What should it say? What if Petitioner could not read English, or any other language? The list of "what ifs" could go on and on. But three things are certain: (1) Petitioner did not even see the clearly visible wires and hence would not have seen a sign on the adjacent poles. (2) He knew without any warning not to touch any overhead wire with a metal object. (3) His employer knew the wires carried high voltage.

However, this Court need not decide whether the failure to require notice to Petitioner himself that these were high voltage wires somehow amounted to a denial of due process for the reason that this issue was never reached by the Court of Appeals. Said that court:

> We note, however, that the constitutional issue raised by Preston appears irrelevant. Preston's sole constitutional ground asserts that the High-Voltage Safety Act is unreasonable, arbitrary, and capricious because it fails to require the utility to identify which of its lines are high-voltage lines. But a filed and recorded public document in which Ashland granted an electrical power easement to Georgia Power clearly identifies the voltage of the power lines and demonstrates that *Ashland* had actual notice of

> the high voltage. In light of the evidence that Ashland was required to give notice to Georgia Power and was aware of the high voltage carried by the power lines, Preston's lack of knowledge is immaterial to the application of OCGA § 46-3-39(a).

Preston v. Georgia Power Company, 227 Ga. App. 449, 453, 489 S.E.2d 573 (1997).

It is Hornbook law that courts will decide only such questions as are necessary for a determination of the case presented. 21 CJS Courts § 136. Courts deal with cases upon the basis of the facts disclosed and never with nonexistent and assumed circumstances. *The Associated Press v. National Labor Relations Board*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937). Courts are not roving commissions assigned to pass judgment on the validity of the nation's laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L. Ed.2d 839, 93 S.Ct. 2908 (1973). Inasmuch as Petitioner's due process claim was not essential to the lower court's ruling, it should not be ruled on by this Court.

D. THE FAILURE OF THE ACT TO REQUIRE NOTICE TO PETITIONER OF THE LINE'S VOLTAGE DOES NOT VIOLATE HIS DUE PROCESS RIGHTS

Should the Court determine that procedurally Petitioner's claim is ripe for consideration, substantively it must fail. The trial court's analysis best illustrates why his claim lacks merit. The trial court held:

> Plaintiff asserts that because there is no way for the general public to determine what is and

> is not a high-voltage line, the Act is unconstitutional. However, under Constitutional due process analysis a statute is sufficiently clear if men of common intelligence need not guess at its meaning or differ as to its application. *See, Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Gouge v. City of Snellville,* 249 Ga. 91, 93 (1982). The High-Voltage Safety Act meets this standard. The Act explicitly defines "high-voltage lines" as any "electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground." O.C.G.A. § 46-3-32(1). Simply because the Act does not impose an affirmative duty on owners or operators to post notice of the voltage does not mean that the general public cannot determine whether an electrical line is "high-voltage."

Pet. For Cert., App. 39a.

Insofar as Respondent is aware, none of the states which have statutes[4] regulating activities around high voltage lines provide that the utility must identify the voltage of the lines. At least one state has considered and rejected Petitioner's argument.

> The language of the statute, however, does not excuse the violator simply because he was unaware of the line's actual voltage. Such a loophole in the statutory scheme would clash with the legislative purpose of promoting the safety of those required to work near potentially deadly high voltage lines.

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[4] These statutes are listed in the Petition at p. 21.

Atwater v. Matanuska Electric Association, 727 P.2d 774, 776 (Alaska, 1986).

The Georgia Supreme Court, in *Santana v. Georgia Power Company*, 269 Ga. 127, ___ S.E.2d ___ (1998) rejected a similar challenge. That court held:

> The language of the HVSA is clear and unambiguous in its requirement that notice be given before work is commenced in proximity to high-voltage lines, and in its provision that lack of such notice insulates the owner of the lines from liability. Although persons of common intelligence may not be sure which power lines qualify as "high voltage lines," and may have to ask to find out, there is no doubt engendered by the statute about the necessity of giving notice prior to working in proximity to such lines or about the effect of failing to give the notice. Thus, persons of common intelligence need not guess at the meaning of the statute and, once in possession of the necessary facts, should not differ as to its application.

Id., at 128-129.

Even if the Act did not impose a notification duty on the Petitioner himself but only on his employer, the result would be the same. Ashland was required to give notice to Respondent and it had full knowledge that this was a high voltage line. Absent notice from anyone, Respondent is entitled to its statutory immunity.[5]

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[5] No one is seeking to prosecute Petitioner for not notifying Georgia Power. No one is seeking to recover from Petitioner damages to the line or on account of an interruption of service. All that Georgia Power argues is that a necessary condition precedent to its liability, i.e., notice, has never occurred.

CONCLUSION

The decision which Petitioner asks this Court to review found it unnecessary to rule on the challenge presented to this Court. Whether under certain circumstances the Act might be held unconstitutional does not make this appeal ripe for review. But even so, Petitioner had no vested interest in requiring the legislature to maintain the status quo. No due process right has been violated. The Petition should be denied.

Respectfully submitted,

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